



**Republic v Public Procurement Administrative Review Board; Director
General Energy and Petroleum Regulatory Authority (Exparte Applicant);
Datasec Limited (Interested Party) (Judicial Review Application E045 of 2022)
[2022] KEHC 27095 (KLR) (Judicial Review) (5 May 2022) (Judgment)**

Neutral citation: [2022] KEHC 27095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW
JUDICIAL REVIEW APPLICATION E045 OF 2022**

**AK NDUNG’U, J
MAY 5, 2022**

BETWEEN

REPUBLIC APPLICANT

AND

**PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW
BOARD RESPONDENT**

AND

**DIRECTOR GENERAL ENERGY AND PETROLEUM REGULATORY
AUTHORITY EXPARTE APPLICANT**

AND

DATASEC LIMITED INTERESTED PARTY

JUDGMENT

1. The brief background of the proceedings in this matter is that the court in its order of March 24, 2022 granted the *Ex parte* applicant herein leave to file a Substantive Notice of Motion application seeking for judicial review orders to be issued against the respondent’s decision in Request for Review Application No 13/2022; Datasec Limited versus The Director General, Energy & Petroleum Regulatory Authority.



2. The Notice of Motion application is dated March 25, 2022 and it seeks the following Orders;
 - i. An Order of *Certiorari* removing to the High Court for the purposes of quashing the Respondent's decision dated March 4, 2022 as delivered in PPARB Application No 13/2022 Datasec Limited versus The Director General, Energy & Petroleum Regulatory Authority.
 - ii. Costs of and incidental to the application be provided for.
 - iii. Such further or other reliefs as the Honourable Court may deem just and expedient to grant.
3. The Application is supported by a Statutory Statement dated March 21, 2022 and Verifying Affidavit sworn by Daniel Kiptoo Bargoria on even date.
4. The facts leading to the Judicial Review application before this Court are that in the Respondent's decision in PPARB Application No 159 of 2021; Datasec Limited vs. Director General, Energy & Petroleum Regulatory Authority dated 13th January, 2022 the letter of notification of award dated 28th October, 2021 issued in regard to Tender No EPRA/SCM/4/3/21-22/012 was cancelled and set aside for failing to comply with Section 87 of the *Public Procurement and Asset Disposal Act* as read together with regulation 82 of the *Regulations* 2020.
5. The Tender was for the provision of consultancy services to assist with the re-design and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT strategies, policies, applications, infrastructure and ICT skills set at the Energy Regulatory Authority.)
6. The Respondent in its decision directed the Authority to issue a letter of notification of award to the Interested Party, notify the unsuccessful bidders, complete the procurement process in Tender No EPRA/SCM/4/3/21-22/012 and to extend the Tender validity period.
7. In its letter dated January 31, 2022 and pursuant to the Respondent's decision the Authority recalled the letter of notification dated October 28, 2021 and its subsequent letter of 3rd February, 2022 extended the Tender validity period for a further 30 days from the date of expiry of the Tender which was January 9, 2022. The applicant proceeded with the procurement process as ordered but terminated the tender vide letter dated February 3, 2022 based on material governance issues surrounding the tender process. In conformity with section 63(1) of the Act.
8. The Respondent is said to have found that the termination was not done in accordance with the said Section and that the governance issues had already been canvassed and overruled in PPARB Application No 159 of 2021 and could therefore not constitute valid reasons to terminate the procurement proceedings. It is the Ex parte applicant's case that the reasons given by the Respondent when reaching its decision were for failing to comply with Section 87 of the Act as read with regulation 82 of the *Regulations* 2020.
9. The Ex parte applicant contends that for the foregoing reasons the respondent's decision dated March 4, 2022 was based on an error of law and is ultra vires as section 63 of the Act envisages termination of procurement proceedings prior to the notification of a tender award. Further that the Authority was yet to issue a notification of tender award having been nullified by the Respondent. The Board is accused of having acted outside its scope by interfering with the Authority's right to terminate procurement proceedings as envisaged under section 63(1)(e) of the Act. In addition, the *Ex parte*



- applicant deposes that the Authority's right cannot be defeated in the absence of a notification of award.
10. The respondent in its replying affidavit sworn by Stanley Miheso a Senior Officer of the secretariat of the respondent on April 25, 2022 states that the Interested Party lodged a Request for Review No 13 of 2022 seeking the orders contained therein and that previously there had been a Request for Review Application No 159 of 2021 filed by the same party to which a decision was rendered on January 13, 2021 and the procurement proceedings for the subject tender suspended.
 11. Mr Miheso contended that all parties were afforded an opportunity to file and urge their respective positions. It was argued that the Board in arriving at its decision was alive to all issues raised by parties and well informed of the provisions of the law applicable and the facts and issues raised including provisions of *the Constitution*, 2010, *Public Procurement and Asset Disposal Act* and all other applicable legislation. It is the Respondent's case that it acted well within its jurisdiction and observed the rules of natural justice. It also acted lawfully, fairly and reasonably in exercise of its statutory mandate under section 28 as read together with section 173 of the Act.
 12. The Interested Party in response to the instant application has filed a Notice of Preliminary Objection dated March 31, 2022 and also a replying affidavit sworn by Gladys Njiru the Managing Director of the Datasec Limited on March 31, 2022. The Notice of Preliminary Objection reads as follows;
 - 1) That the application was filed out of time contrary to the provisions of section 175(1) of the *Public Procurement and Disposal Act*, 2015.
 13. In its Replying Affidavit the Interested Party contends that the application herein is time barred and should therefore be struck out. Further, that the application is in the nature of an appeal against the Respondent's decision in PPARB No 13 of 2022 and thus this Court cannot entertain it.
 14. Through the letter of 28th October, 2021 the Interested Party is said to have been notified by the Procuring Entity of having been awarded Tender No EPRA/SCM/4/3/21-22/012 at the contract sum of Kshs. 13,620,000/= . The Ex parte applicant's delay in executing the contract and Datasec's apprehension that the validity period would expire led to the lodging of PPARB No 159 of 2021 and in its response the Ex parte applicant herein stated that the Procuring Entity had recalled the letter of award due to discovered material governance issues in the tendering process.
 15. It is urged that the respondent in giving its orders only directed for the cancellation and setting aside of the letter of award dated October 28, 2021 as the Procuring Entity had failed to notify the unsuccessful tenderers of the outcome of the tendering process.
 16. According to the respondent, the said decision having not been challenged or set aside by either of the Parties' was final and binding and when the Ex parte applicant failed to comply with it, the Interested Party issued a formal demand for compliance through a letter dated February 1, 2022.
 17. The Ex parte applicant then through an email dated February 8, 2022 forwarded a letter dated January 31, 2022 recalling the letter of award dated October 28, 2021. Subsequently, another email was received from the Ex parte applicant at 4.27 pm forwarding a letter dated 3rd February, 2022 extending the tender validity period by thirty (30) days from January 9, 2022. On the same day, an email from the applicant was received at 4.40 pm forwarding a letter dated February 3, 2022 and whose effect was to terminate the tender pursuant to the provisions of section 63(1)(e) of the Act.
 18. It is the Interested Party's case that aggrieved by the said decision, it filed PPARB No 13 of 2022; Datasec Ltd v. The Director General, Export and Petroleum Regulatory Authority in which the Procuring Entity in its defence contended that the termination was so as to avoid furthering an illegal



- procurement process. It was contended that the illegality stems from the Ex parte applicant' perception that the tender period had lapsed while in essence the same was to lapse on 22nd March,2022.
19. The respondent having failed to comply with the said decision, it is stated that a formal demand for compliance was issued by the Interested Party vide a letter dated March 14, 2022.
 20. The Interested Party also contends that the letter of award was not quashed but only set aside and that no fresh evaluation was ordered by the Respondent. The Procuring Entity was to issue notifications in compliance with section 87 as read with regulation 82 hence the reason for setting aside the said letter so that the date of notification would be in tandem with the notifications to the unsuccessful bidders.
 21. It is the interested party's case that the Respondent acted within its jurisdiction as section 63(1) of the Act prohibits a Procuring Entity from terminating a tender where an award has been made. The tender termination is said to have been based on an erroneous calculation. It is urged the material governance issues alleged had already been canvassed in PPARB No 159 of 2021. In addition, the interested party asserts that the Respondent has powers to give directions in respect of anything to be done or redone in procurement proceedings pursuant to section 173 of the Act.
 22. The Ex parte applicant herein in response to the interested party's notice of preliminary objection and replying affidavit filed a Further Affidavit also sworn by Daniel Kiptoo Bargoria on April 4, 2022. In the Affidavit Mr Kiptoo contends that contrary to the Interested Party's contention the Substantive Notice of Motion was filed on March 28, 2022, three days after directions were issued by the court on March 24, 2022.
 23. The three days according to the Ex parte applicant were to end on March 27, 2022 which was a Sunday, however pursuant to section 57(b) of the Interpretation and General Provisions Act if the last day of the period is Sunday the period shall include the next following date.
 24. Further, the deponent urged that the Application for leave dated 21st March, 2022 was submitted on the judiciary's e-filing portal on March 21, 2022 at 22.38.57 and invoice issued. This was within the period stipulated under section 175(1) of the Act. The Respondent's decision is also said to have been collected on March 7, 2022.
 25. according to Mr Kiptoo, the failure to issue a receipt cannot be blamed on the Ex parte applicant as payment was made on March 22, 2022 and the same could not be completed as the organization receiving the payment was unavailable.
 26. The Parties canvassed the application by way of written submissions. The Ex parte applicant in its submissions dated April 4, 2022 identifies two issues for determination and that is whether the Ex parte Application was filed out of time contrary to the provisions of Section 175(1) of the PPADA,2015 and whether the application raises sufficient grounds for judicial review.
 27. On the first issue the Party begins by citing *Mukisa Biscuits Manufacturing Co Ltd vs. West End Distributors Ltd* [1969] EA 696 on what constitutes a Preliminary Objection. It is submitted that the time within which the Ex parte applicant ought to have filed the said application started running from 7th March,2022 and terminated on Sunday, March 20, 2022 but in light of section 57(b) of the Interpretation and General Provisions Act the last day of filing was March 21, 2022. The Interested Party's Preliminary Objection is challenged for failure to meet the threshold as in the Mukisa Biscuits case supra.
 28. The Ex parte applicant also contends that the decision of the respondent dated March 4, 2022 is based on an error of law and is ultra vires. To support this argument, the case of JGH Marine A/S Western



Marine Services Ltd CNPC Northeast Refining & Chemical Engineering Co. Ltd/ Pride Enterprise v Public Procurement Administrative Review Board & 2 Others[2015] eKLR has been cited.

29. The respondent is faulted for having declared that the material governance issues cited for the termination of the tender had already been determined and as such that they were res judicata. It is the Ex parte applicant's case that the same were not determined on their own merit. The Court of Appeal case of *The Independent Electoral and Boundaries Commission vs. Maina Kiai & 5 Others* [2017] eKLR case is cited in this regard. The respondent's decision of January 13, 2022 from page 37 is also cited in support of this argument. The letter of award is said to have been cancelled and set aside for failing to comply with the required sections of the law and not on material governance issues.
30. The respondent in its Written Submissions dated April 26, 2022 contends that although the application before this Court is framed as a judicial review application it is seeking to improperly invoke an appellate jurisdiction of the High Court. Further, that the matter before this Court being a judicial review case, the Court is not empowered to venture into correcting the decision of the Respondent on merits. To buttress this argument, the cases of Republic v *Public Procurement Review Board & Another Ex Parte GIBB Africa Ltd & another* [2012] eKLR and *Pastoli v. Kabale District Local Government Council & Others* [2008] 2 EA 300 are cited in support of this position. It is urged that a party in judicial review who seeks the issuance of any of the orders sought must prove breach of any of the grounds enunciated in the case above.
31. On the purpose of judicial review, the Respondent cites the cases of Republic v. Kenya Revenue Authority Ex parte Yaya Towers Limited[2008] eKLR, *Seventh Day Adventist Church (East Africa) Limited v Permanent Secretary, Ministry of Nairobi Metropolitan Development & Another* [2014] eKLR and *Kenya Pipeline Company Limited v Hyosung Ebara Company Limited & 2 others* [2012] eKLR.
32. In addition, the Respondent submits that a party must demonstrate that a Tribunal has committed an error of law for the Court to issue the said judicial review orders and also demonstrate that there was a mistake that goes to the jurisdiction of the tribunal. A misinterpretation of the law according to the Respondent is not sufficient to move a judicial review application.
33. In conclusion, the Respondent contends that a Judicial review court is only concerned with the fairness of the process under which the impugned decision or action was reached and once a judicial review court gives a clean bill of health to the process, it must down its tools without considering the merits of the decision. The Respondent cites the cases of *Municipal Council of Mombasa v Republic & Another* [2002] eKLR and *Republic v Kenya Power & Lighting Company Limited & Another* [2013] eKLR. Judicial review orders of certiorari, mandamus and prohibition according to the Respondent are public law remedies and the court has the ultimate discretion to either grant or not to grant the said remedies to the successful applicant. The Ex parte applicant it is argued has failed to make out a case for the issuance of the orders sought.
34. The interested party herein in its Written Submissions dated April 8, 2022 identifies 2 issues for determination and these are whether the Chamber Summons dated March 21, 2022 was filed out of time and if not, whether the applicant is entitled to the prayers sought.
35. On issue number one, the party submits that the preliminary objection was in regard to the Chamber Summons application and not the Notice of Motion as alleged by the Ex parte applicant. The PO is said to raise a point of law which if upheld will dispose of the substantive motion as was held in the case of *Republic v Public Procurement Administrative Review Board & another Interested Party Optic Technologies Kenya Ltd Ex-Parte County Assembly of Busia*[2017] eKLR.



36. The filing fees or the Chamber Summons according to the Interested Party was paid on 22nd March, 2022 and the case registered on the same date according to the e-filing portal. The case number, it is contended is generated upon payment of the requisite fees and not at the time of assessment of court fees. The Ex parte applicant is accused of failing to give an explanation as to why the first attempt at paying was made at 10.58 pm on 21st March, 2022. The case of Republic v Public Procurement Administrative Review Board & another Interested Party Optic Technologies Kenya Ltd Ex-Parte County Assembly of Busia supra is cited where the court emphasis on adherence to timelines provided under statute.
37. The Interested Party further submits that the time as provided under Section 175(1) of the Act started running as soon as the Respondent issued its decision and not when the Ex parte applicant collected the said decision. The latter according to Datasec Limited is only useful in an application to extend time. According to section 59(a) of the *Interpretation and General Provisions Act* time started running from March 5, 2022 and ended on March 19, 2022 and because the said date was a Saturday the Ex parte applicant ought to have filed the Chamber Summons on 21st and not March 22, 2022 and therefore the same was filed out of time. The case of *Republic v Public Procurement Administrative Review Board & another Ex-Parte Wajir County* [2016] eKLR is cited in this regard.
38. It is the interested party's submission that judicial review is concerned with the decision making process as opposed to the merits of the impugned decision. The case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Central Kenya Fresh Merchants Limited*[2018] eKLR is cited in this regard. The Halsbury's Laws of England at Paragraph 77 page 170 are also cited on the scope of judicial review.
39. The interested party also submits that grounds 7 and 8 of the Ex parte applicant's Chamber Summons questions the respondent's merit determination of issues in PPARB No 13 of 2022 whereas this court can only entertain the legality and procedural propriety or otherwise of the Respondent's decision. The case of *Kenya Pipeline Company Ltd vs. Hyosung Ebara Company Limited & 2 others*[2012] eKLR is cited in this regard.
40. In conclusion, it is submitted that the Chamber Summons dated March 21, 2022 upon which the Notice of Motion dated March 25, 2022 is anchored on is fatally incompetent. Further, that the Ex parte applicant has also failed to establish grounds upon which the court should exercise its discretion in the Procuring Entity's favour and in support of this position the case of *Republic v Public Procurement Administrative Review Board & 2 others Ex-Parte Central Kenya Fresh Merchants Limited* [2018] eKLR is cited.
41. I have had occasion to consider the application, the grounds in support as seen in the statutory statement and verifying affidavit, the responses and the learned submissions by counsels. Distilled therefrom the issues for determination are;
- i. Whether the application was filed out of time contrary to section 175(1) of the Procurement and Asset Disposal Act.
 - ii. Whether the applicant has established a case for the grant of the judicial review orders sought.
42. I begin with the preliminary objection mounted by the Interested party as based on the court's finding, it has the potential to determine the suit herein with finality.



43. What constitutes a preliminary objection is now well settled. In *Mukisa Biscuit manufacturing Co. Ltd vs Westend Distributors Ltd* (1969) EA 696 a preliminary objection was defined with precision. The court stated;

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

This was followed up by the judgment of Sir Charles Newbold in the same case:

"The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop".

44. The preliminary objection herein is based on a statutory limitation imposed by section 175(1) of the Act that defines the period within which a party aggrieved by the decision of the Board should seek judicial review by the High Court. The section reads;

"A person aggrieved by a decision made by the review Board may seek judicial review by the High Court within fourteen days from the date of the Review Boards decision, failure to which the decision of the Review Board shall be binding to both parties".

45. I agree with Aburili J in her finding in *Public Procurement Administrative Review Board & Another, Interested Party Optic Technologies Kenya Ltd; Ex parte County Assembly of Busia* where she held;

"I have no doubt in my mind that a preliminary objection based on limitation or statutory bar is a pure point of law for consideration without delving into the merits arguments of the case."

46. When a particular matter was filed in the court's registry or portal as the case maybe is readily discernible from the court's own record and the question whether the filing is or without timelines is a point that should not invite factual arguments.

47. I hasten to add that such a preliminary point should be clear, precise and unambiguous requiring no explanations. And this leads me to the PO as drawn in this matter. The wordings of the PO are as follows;

"Take Notice that the interested Party shall at the hearing of the Ex Parte applicant's Notice of Motion dated 25/3/22 raise a preliminary objection on a point of law to wit;

1. That the application was filed out of time contrary to the provisions of section 175(1) of the Public Procurement and Disposal Act, 2015."

48. My reading of section 175(1) of the Act and a proper interpretation thereof would be that once an aggrieved party files within 14 days of the Board's decision a chamber summons seeking leave to challenge the decision of the Board by way of judicial review, such a party would have met the legal



timelines notwithstanding when thereafter the substantive Motion is filed should the leave sought be granted.

49. A plain reading of the PO as drawn gives no clarity as to what filing is under attack. This fact is confirmed by counsel for the Interested Party who in their submissions found it necessary to clarify to which application the PO relates. At paragraph 10 of the written submissions counsel states;

“The PO is on a point of law grounded on section 175(1) of the Act. The Interested Party submits at the outset that the PO is in respect of the chamber summons and not the Notice of Motion. It is the Interested Party’s position that the chamber summons was filed out of time contrary to section 175(1) of the Act.....”

50. No wonder that the Ex Parte applicant has laboured to explain both the filings of the chamber summons and the Notice of Motion in their response to the PO and in submissions. In my view, it was critical for the PO to clearly indicate that it was targeted at the chamber summons. The clarification in the submissions cannot suffice and the ambiguity in the PO renders it unsustainable.

51. I agree with counsel for the Interested Party that the statutory timelines under section 175(1) are mandatory and anyone running foul of the same would divest the court of jurisdiction. This court in Judicial Review Application No E 142 of 2021, Royal Automation Ltd vs Public Procurement Administrative Review Board & Another stated;

“Where there exists a statutory edict on timelines, it is not within the province of the court to interpret the law in a manner that deviates from the intention of the legislature. The court must interpret the particular law in a manner that gives effect to the intention of parliament. Where the statute sets timelines for the doing of a particular act, those timelines have to be enforced. The Court of Appeal in Arprim Consultants v Parliamentary Service Commission & Another CA No E039 of 2021 addressed the issue in the following terms:

“We accept that to be the proper approach a court must take when faced with clear statutory commands, no matter how much they may appear to be burdensome. Inconvenience or difficulty of compliance will never be an excuse for a court to go against the clear language of Parliament. The most a court can do is point out the difficulties created by such requirements and timelines and perhaps make proposals for reform, but as long as the law remains etched, in plain language, it is the province of the courts to interpret and give effect to its express language.”

52. In our case, the PO raised is ambiguous. Despite being alive to the legal requirements in respect of meeting timelines set in law, the PO as drawn fails for reasons above stated.

53. Turning to the merits of the application, I endeavour to answer the question whether the Ex Parte applicant has met the threshold for grant of judicial review orders sought. It is common ground that a decision of the Board in Request for Review 159 of 2021 was made on the 13th of January 2022. There appears, however, divergence in the manner of interpretation of the orders and import of that decision. To my mind, the propriety or otherwise of the decision of the board of March 4, 2022 which is impugned herein turns on a clear understanding of the import of the decision of the Board in Request for Review 159 of 2021. A peek at the decision of January 13, 2022 is necessary.



54. After hearing the parties in Request for Review 159 of 2021, the board made the following orders;

1. The letter of notification of award dated 28th October 2021 issued to the applicant by the Respondent in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority be and is hereby cancelled and set aside.
2. The Respondent is hereby directed to forthwith issue a letter of notification of award to the applicant at the same time notify the unsuccessful tenderers that they were not successful in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 in tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority.
3. The Respondent is hereby directed to complete the procurement process in Tender No: EPRA/SCM/4/3/2122/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority to its logical conclusion including executing a procurement contract within 30 days from the date of this decision but not earlier than 14 days from the date when tenderers will be notified of the outcome of evaluation of tenders subject to there being no review filed with the Board under Section 167(1) of the Act.
4. The Respondent is hereby directed to extend the tender validity period in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority for a further period of 30 days from the date when the same is set to expire taking into account the Board's findings in this decision.
5. Given that the procurement proceedings in Tender No: EPA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority, are not complete, each party will bear its own costs.



55. A proper reading and interpretation of these orders can be summed up as follows; The Board was satisfied that the Interested Party had won the award of the tender. There was, however, breach of section 87 of the Act as read with Regulation 82 of Regulations 2020 since unsuccessful tenderers had not been notified. The letter of notification of award to the Interested party dated October 28, 2021 was cancelled and set aside; to comply with the law, the Ex Parte applicant was directed to forthwith issue a letter of notification of award to the Interested Party and at the same time notify unsuccessful tenderers that they were not successful; the Ex Parte applicant was to complete the procurement process to its logical conclusion including execution a procurement contract within 30 days; the Ex Parte applicant was to extend the tender validity period for a further 30 days.
56. Of note here is that the decision and consequent orders above were never challenged as envisioned under section 175 (1) of the Act and in the wording of the section “..... Failure to which the decision of the Review Board shall be final and binding to both parties”
57. We move fast forward to Request for Review No 13 of 2022 which forms the subject of this litigation. In its decision dated March 4, 2022, the Board affirmed its decision of January 13, 2022 and from the tone of the decision, the Board just fell short of stating that the Ex Parte applicant was in contempt of the earlier orders. The Board made the following orders;
1. The letter of termination of the procurement process dated 3rd February 2022 issued by the Respondent all the bidders in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority be and is hereby cancelled and set aside.
 2. The Respondent is hereby directed to issue a letter of notification of award to the applicant within 3 days of this decision and at the same time notify the unsuccessful tenderers that they were not successful in accordance with Section 87 of the Act read with Regulation 82 of Regulations 2020 in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority.
 3. The Respondent is hereby directed to complete the procurement process in Tender No: EPRA/SCM/4/3/2122/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority to its logical conclusion including executing a procurement contract within 30 days from the date of this decision but not earlier than 14 days from the date when tenderers will be notified of the outcome of evaluation of tenders subject to there being no review filed with the Board under Section 167(1) of the Act.



4. Taking into account the Board's findings in this decision and the earlier decision dated 13th January 2022 rendered in PPARB Application Number 159 of 2021, the tender validity period in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority is hereby extended for a further period of 30 days from the date when the same is set to expire that is 22nd March 2021 and it shall run up to 21st April 2022.
5. Given that the procurement proceedings in Tender No: EPRA/SCM/4/3/21-22/012 for Consultancy Services to assist with the redesign and implementation of an improved, more efficient and appropriate regulatory management information system (including review of the adequacy of the existing ICT Strategies, Policies, Applications, Infrastructure and ICT skill sets at Energy and Petroleum Regulatory Authority, are not complete, each party will bear its own costs.

58. This court is well aware of the scope of its judicial review jurisdiction. In *Council of Civil Service Unions vs Minister for the Civil Service* [1984] 3 ALL ER 935 put it thus;

"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality" the second "irrationality" and the third "procedural impropriety....."

59. The mainstay of the Ex Parte applicant's case is that the decision of March 4, 2022 was made in error of law and was ultra vires and contrary to section 63 of the Act. With profound respect, I must state that there is an apparent serious misapprehension by the Ex Parte applicant of the import of the decision of January 13, 2022. The Ex Parte applicant seems to suggest that the subject procurement process was re-opened afresh by that decision. Yet, it is plain and obvious from that decision that the Board held the award to the Interested Party as valid save for the lack of notification to the unsuccessful tenderers which omission the Board in its decision remedied. It was not open to the Ex Parte applicant to reevaluate the tender and the only option in law was to challenge the decision under section 175(1) of the Act. By its failure so to do, the decision became binding to the Ex Parte applicant and other parties. The Ex Parte applicant is rushing to close the stable door when the horse has bolted. Any governance issues revolving around section 63 of the Act as alleged ought to have been raised during the hearing of request for review 159 of 2021. In any event the Board sitting on Request for Review No 13 of 2022 considered the issues raised and made a determination.

60. I have looked at the record of the proceedings before the board. I have not come across any instance of illegality, irrationality or procedural impropriety. All parties were given a hearing and all issues raised considered. The Board reached a decision within its jurisdiction. This court must eschew any semblance of sitting on appeal over that decision which is outside its review jurisdiction.



61. In *Chief Constable v Evans* [1982] 3 ALL. ER 141, Lord Brightman said at page 154 para (d): -

“Judicial review is concerned not with the decision, but with the decision making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power”.

At paragraph e the court added;

“Judicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision was made”.

62. The special jurisdiction and functional independence of the Board was buttressed in the case of *Kenya Pipeline co Ltd vs Hyosung Ebara Co. Ltd and others*[2012] eKLR where the court held;

“The Review Board is a specialized statutory tribunal established to deal with all complaints of breach of duty by the procuring entity. By Reg. 89, it has power to engage an expert to assist in the proceedings in which it feels that it lacks the necessary experience. S. 98 of the Act confers very wide powers on the Review Board. It is clear from the nature of powers given to the Review Board including annulling, anything done by the procurement entity and substituting its decision for that of the procuring entity that the administrative review envisaged by the Act is indeed an appeal. From its nature the Review Board is obviously better equipped than the High Court to handle disputes relating to breach of duty by procurement entity. It follows that its decision in matters within its jurisdiction should not be lightly interfered with.

Having regard to the wide powers of the Review Board we are satisfied that the High Court erred in holding that the Review Board was not competent to decide whether or not the 1st Respondent’s tender had met the mandatory conditions. The issue whether or not the 1st Respondent’s tender was rightly rejected as unresponsive was directly before the Review Board and the Board had jurisdiction to deal with it.

In conclusion, it is manifest that the application for Judicial Review was not well founded. The 1st Respondent did not establish that the Review Board had acted without jurisdiction or in excess of jurisdiction or in breach of rules of natural justice or that the decision was irrational. The Judicial Review was not confined to the decision making process but rather with the correctness of the decision on matters of both law and fact. So long as the proceedings of the Review Board were regular and it had jurisdiction to adjudicate upon the matters raised in the Request for Review, it was as much entitled to decide those matters wrongly as it was to decide them rightly.

The High Court erred in essence in treating the judicial review application as an appeal and in granting judicial review orders on the grounds which were outside the scope of Judicial Review jurisdiction.”

63. In the end I reach the inevitable conclusion that the applicant has fallen far short of establishing a case for judicial review orders. I find the application dated March 25, 2022 without merit. The same is dismissed. Given the stage at which the procurement process is, each party is to bear its own costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 5 TH DAY OF MAY 2022

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A. K. NDUNG’U



JUDGE

